United Nations A/CN.9/604

General Assembly

Distr.: General
9 May 2006

Original: English

**United Nations Commission on International Trade Law**
Thirty-ninth session
New York, 19 June-7 July 2006

# Possible future work in the area of electronic commerce

## Note by the Secretariat*

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* Submission of this document was delayed due to late receipt of contributions by outside experts.

V.06-53896 (E) 290506 290506

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# I. Introduction

1. At its thirty-eighth session, the Commission considered the possibility of undertaking future work in the area of electronic commerce in the light of a note submitted by the Secretariat in pursuance of the Commission's mandate to coordinate international legal harmonization efforts in the area of international trade law.[1] In that note, the Secretariat had summarized the work undertaken by other organizations in various areas related to electronic commerce (A/CN.9/579). It was pointed out that the range of issues currently being dealt with by various organizations were indicative of the various elements required to establish a favourable legal framework for electronic commerce.

2. It was then pointed out that the UNCITRAL Model Law on Electronic Commerce,[2] the UNCITRAL Model Law on Electronic Signatures,[3] as well as the Convention on the Use of Electronic Communications in International Contracts,[4] which the Commission approved during that session, provided a good basis for States to facilitate electronic commerce, but only addressed a limited number of issues. The Secretariat noted that more needed to be done to enhance confidence and trust in electronic commerce, such as appropriate rules on consumer and privacy protection, cross-border recognition of electronic signatures and authentication methods, measures to combat computer crime and cybercrime, network security and critical infrastructure for electronic commerce and protection of intellectual property rights in connection with electronic commerce, among various other aspects. It was further noted that there was no single international document providing guidance to which legislators and policymakers around the world could refer for advice on those various aspects. The task of legislators and policymakers, in particular in developing countries, might be greatly facilitated if such a comprehensive reference document were to be formulated.[5]

3. The Commission welcomed the information provided in the note by the Secretariat and confirmed the usefulness of such cross-sectoral overview of activities from the viewpoint both of its coordination activities and of the information requirements of Member States. There was general agreement that it would be useful for the Secretariat to prepare a more detailed study, in cooperation and in consultation with the other international organizations concerned, for consideration by the Commission at its thirty-ninth session, in 2006. Such an overview, with proposals as to the form and nature of the reference document that would be envisaged, would be useful to allow the Commission to consider possible areas in which it could itself undertake legislative work in the future, as well as areas in which legislators and policymakers might benefit from comprehensive information, which did not necessarily need to take the form of specific legislative guidance. It was agreed that, in considering that matter, the Commission should bear in mind the need to ensure appropriate coordination and consultation with other organizations and to avoid duplicating or overlapping work.[6]

4. As regards the range of issues to be considered in such a detailed overview, the following areas were suggested: transfer of rights in tangible goods or other rights through electronic communications, intellectual property rights, information security, cross-border recognition of electronic signatures, electronic invoicing and online dispute resolution. The Commission's attention was also drawn to the recommendations for future work that had been made by the Working Group (see

A/CN.9/571, para. 12). It was agreed that those recommendations should also be considered in the context of the detailed overview to be prepared by the Secretariat, to the extent that some of them were not reflected in the explanatory notes to the Convention on the Use of Electronic Communications in International Contracts, which the Secretariat has prepared pursuant to the Commission's request (see A/CN.9/608 and Addenda 1-4), or in separate information activities undertaken by the Secretariat, such as monitoring the implementation of the UNCITRAL Model Laws on Electronic Commerce and Electronic Signatures, and compiling judicial decisions on the matters dealt with in those Model Laws.[7]

5. The present note is submitted pursuant to the Commission's request. It identifies the issues proposed to be considered for inclusion in a comprehensive reference document. This note explains the relationship between the various issues and the Commission's area of work and offers suggestions on possible ways of dealing with them.

6. This note should be read in conjunction with the note A/CN.9/579, on current work by other organizations in the area of electronic commerce, which was submitted to the Commission's thirty-eighth session, and note A/CN.9/598, paragraphs 15 to 34, of the current session, which contains update information on the same matter. With a view to avoiding repetition, and in compliance with the General Assembly guidelines on limitation of documentation, this note omits references already contained in those two notes.

## II. Possible topics for a comprehensive reference document in the area of electronic commerce

### A. Authentication and cross-border recognition of electronic signatures

#### 1. The issues

7. In an electronic environment, the original of a message is indistinguishable from a copy, bears no handwritten signature, and is not on paper. This may give rise to fears about possible misuse or fraud due to the ease of intercepting and altering information in electronic form without detection, and the speed of processing multiple transactions. The purpose of various techniques currently available on the market or still under development is to offer technical means by which some or all of the functions identified as characteristic of handwritten signatures can be performed in an electronic environment. Such techniques may be referred to broadly as "electronic signatures".

8. One such technique makes use of pairs of mathematically related "keys" (i.e. large numbers produced using a series of mathematical formulae) to generate an electronic signature (called "digital signature"), and verify that it originates from the purported signatory. One of the keys (the "private key" kept secret by the signatory) is used for creating a digital signature or transforming data into a seemingly unintelligible form, while the other one (the "public key" made known to the addressee) is used for verifying a digital signature or returning the message to its original form. However, since a public- and private-key pair has no intrinsic

association with any person, the addressee needs additional assurance about the usefulness of the public key to identify the signatory. One type of solution to this problem is the use of one or more third parties to associate an identified signatory or the signatory's name with a specific public key. These third parties are generally referred to as a "certification service providers", and in a number of countries their functions are being organized hierarchically into what is often referred to as a "public-key infrastructure" (PKI). However, other solutions may include, for example, certificates issued by relying parties.

9. In practice, suppliers of certification services issue certificates with various levels of reliability, according to the purposes for which the certificates are intended to be used by their customers. Depending on their respective level of reliability, certificates and electronic signatures may produce varying legal effects, both domestically and abroad. For example, in certain countries, even certificates that are sometimes referred to as "low-level" or "low-value" certificates might, in certain circumstances (e.g. where parties have agreed contractually to use such instruments), produce legal effect.

10. Legal issues may arise with regard to cross-certifying or chaining of certificates when there are multiple security policies involved. Examples of such issues may include determining whose misconduct caused a loss and upon whose representations the user relied. These matters are often dealt with at a contractual level; through certification practices statements and general conditions of contract of certification service providers. With a view to promoting the development of an industry still in its infancy, and to protect it against potentially threatening exposure to claims for consequential damages, some jurisdictions admit limitations or exclusions of liability, where the levels of security and policies are made known to the users and there is no negligence on the part of certification authorities. However, the extent to which certification service providers may disclaim liability for loss or damage caused by service failure, or may limit their liability in those cases, is likely to vary from country to country.

11. Alongside "digital signatures" based on public-key cryptography, there exist various other devices, also covered in the broader notion of "electronic signature" mechanisms, which may currently be used, or considered for future use, with a view to fulfilling one or more of the above-mentioned functions of handwritten signatures. For example, certain techniques would rely on authentication through a biometric device based on handwritten signatures. In such a device, the signatory would sign manually, using a special pen, either on a computer screen or on a digital pad. The handwritten signature would then be analysed by the computer and stored as a set of numerical values, which could be appended to a data message and displayed by the relying party for authentication purposes. Such an authentication system would presuppose that samples of the handwritten signature have been previously analysed and stored by the biometric device. Other techniques would involve the use of personal identification numbers (PINs), digitized versions of handwritten signatures, and other methods, such as clicking an "OK-box".

12. Article 12 of the UNCITRAL Model Law on Electronic Signatures encourages States to promote cross-border recognition of electronic signatures. Paragraph 1 of that article reflects the basic principle that the determination of whether and to what extent a certificate or an electronic signature is capable of being legally effective should not depend on the place where the certificate or the electronic signature was

issued but on its technical reliability. Paragraph 2 of that article provides the general criterion for the cross-border recognition of certificates without which suppliers of certification services might face the unreasonable burden of having to obtain licences in multiple jurisdictions. The threshold for technical equivalence of foreign certificates is based on testing their reliability against the reliability requirements established by the enacting State pursuant to the Model Law, regardless of the nature of the certification scheme obtaining in the jurisdiction from which the certificate or signature originates.

13. Article 12, paragraphs 2 and 3, of the Model Law on Electronic Signatures deal exclusively with the cross-border reliability test to be applied when assessing the reliability of a foreign certificate or electronic signature. However, in the preparation of the Model Law, it was borne in mind that enacting States might wish to obviate the need for a reliability test in respect of specific signatures or certificates, when the enacting State was satisfied that the law of the jurisdiction from which the signature or the certificate originated provided an adequate standard of reliability. As to the legal techniques through which advance recognition of the reliability of certificates and signatures complying with the law of a foreign country might be made by an enacting State (e.g. a unilateral declaration or a treaty), the Model Law contains no specific suggestion.

### 2. Justification and proposed approach

14. The lack of common standards for cross-border recognition of electronic signatures and other authentication methods is considered to be a significant impediment to cross-border commercial transactions. Two main problems exist in the given context. On the one hand, technological measures and systems for electronic signatures, in particular digital signatures, are currently much too diverse to enable uniform international standards. On the other hand, fears about fraud and manipulation in electronic communications have led some jurisdictions to establish rather stringent regulatory requirements, which in turn may have discouraged the use of electronic signatures, in particular digital signatures.

15. Wide accession to the recently adopted United Nations Convention on the Use of Electronic Communications in International Contracts, which provides in its article 9 for the functional equivalence between electronic signatures and traditional types of signature, may go a long way towards facilitating cross-border use of electronic signatures. Nevertheless, notarization of electronic documents and electronic signatures in government or other official records are areas in which governments may be inclined to retain national standards capable of hindering or barring recognition of foreign electronic signatures.

16. The issues described above have been under consideration by a number of international organizations, including OECD (see A/CN.9/579, paras. 43-46; A/CN.9/598, paras. 27-28); the European Union (A/CN.9/579, para. 34; A/CN.9/598, para. 21); APEC (A/CN.9/579, paras. 22-26; A/CN.9/598, para. 17), and the Commonwealth secretariat (A/CN.9/598, para. 20). Not all organizations deal with every aspect of these issues and the perspective from which each organization discusses them is not necessarily identical. This variety of sources and diversity of approaches does not facilitate the task of legislators and policymakers interested in establishing a sound legal framework for interoperability and cross-border use of electronic signatures.

17. The Commission may wish to consider that it would be useful to include the issues of authentication and cross-border recognition of electronic signatures in a comprehensive reference document.

## B. Liability and standards of conduct for information service providers

### 1. The issues

18. Information service providers play an essential role in the functioning of the Internet. Typically, they act as intermediaries who transmit or host third party content but do not take part in the decision to disseminate particular material. Liability may arise from theories of direct and indirect or contributory infringement in national tort law, criminal law, and intellectual property law. Most cases arise from the fact that service providers take part in the technical process of transmitting or storing information for third party content of any kind.

19. Responsibility for unlawful content or unlawful acts of their users is related to the opportunity and extent of control that information service providers are able to exert. The possibilities of storage and transmission of data files in data networks have multiplied the opportunities of unlawful behaviour and reduced chances of detection and control. Hence, imposing general liability for service providers would amount to establishing duties to monitor and filter all transmitted or stored content—a burdensome task for information service providers for technical and economic reasons as well as unacceptable for other reasons. As a result, many countries have perceived a need for limiting liability of information services.

20. However, the interest in limiting liability of service providers has to be weighed against the interests of rightholders and injured parties in enforcing their rights and holding all contributing parties responsible. It does not seem to be necessary that the approaches be identical: they may differ depending on the particular circumstances and legal traditions in any given country. But they should be interoperable if global networks and electronic commerce are to develop smoothly.

21. An additional set of legal issues relates to the possible liability of information service providers for failures that occur during transmission of messages (delivery delay or loss of information), or for malfunctioning of data storage systems (loss of stored data or unauthorized access by third parties). Typically, these matters would be dealt with at a contractual level, through general conditions of contract of information service providers. However, the extent to which information service providers may disclaim liability for loss or damage caused by service failure, or may limit their liability in those cases, is likely to vary from country to country.

### 2. Justification and proposed approach

22. The issues described above may affect domestic and international electronic commerce in many ways. Lack of appropriate rules, guidelines or voluntary codes of conduct, or even the perception of insufficient legal protection, undermine confidence in electronic commerce and constitute an obstacle to its development. Conflicting standards across borders may also affect the offer of goods and services,

as business entities operating under a less developed or excessively tolerant framework may enjoy an unfair competitive advantage, as compared to companies required to comply with more stringent requirements. In some cases, operations under a more lenient legal framework may be favoured by business entities interested in shielding themselves from liability that may arise under more stringent regimes. The interest of attracting investment by these companies may need to be weighed against the risk that the host country might be perceived as a safe harbour for unfair business practices, which may damage the reputation of an entire business sector.

23. The issues described above, or aspects thereof, have been under consideration by a number of international organizations, including ITU (A/CN.9/579, paras. 13-15; A/CN.9/598, paras. 24-26); OECD (see A/CN.9/579, paras. 43-51), the European Union (A/CN.9/579, paras. 32-36); APEC (A/CN.9/579, paras. 22-26; A/CN.9/598, paras. 15-17), the Commonwealth secretariat (A/CN.9/579, para. 27; A/CN.9/598, paras. 18-20) and the ICC (A/CN.9/579, paras. 53-56). Not all organizations deal with every aspect of these issues and the perspective from which each organization discusses them is not necessarily identical. This variety of sources and diversity of approaches does not facilitate the task of legislators and policy makers interested in establishing a sound legal framework for the provision of information services.

24. The Commission may wish to consider that it would be useful to include the issues of liability and standards of conduct for information service providers in a comprehensive reference document.

## C. Electronic invoicing and legal issues related to supply chains in electronic commerce

### 1. The issues

25. It is now widely recognized that replacing trade and transport-related paper documents with electronic communications may generate significant savings and efficiency gains in international trade. Electronic equivalents of paper-based invoices play a key role in this process. If the invoices received by a buyer can be processed electronically, there will be efficiencies in working-capital management. This is especially true for geographically dispersed operations, which may need some time just to move paper documents from one place to another, but often it is true even for businesses with a single location. For instance, both buyer and supplier may benefit if the buyer is able to take advantage of discounts for early payment, which becomes much more likely when the presentment and payment cycle is reduced by weeks, perhaps to a single day or "real time".

26. However, the cost savings and efficiency gains from electronic invoicing depend to some extent on uniformity. Since the mid-1990s, many suppliers have established their own, separate systems, allowing their customers to review invoices on line; this is uniform for the supplier, but not for the buyer. A buyer may be willing to invest the necessary resources to conform to a major supplier's electronic invoices system, but is likely to find implementation of several incompatible systems of several suppliers daunting, and may resist even price incentives to be transformed from the selective customer of multiple suppliers into the hostage of one.

27. Some improvement in uniformity for buyers may be achieved by a company—frequently either a bank or a member of a corporate group—that acts as consolidator for several suppliers, although usually it is not this advantage that is emphasized, but rather the usual outsourcing benefits of cost savings, reduced capital commitment or improved efficiency for the suppliers. Some corporate groups are able to consolidate the invoices of their subsidiaries, perhaps in multiple currencies, on a netting basis, and then provide each buyer a single invoice in a single currency, again radically reducing the need for working capital. Further, banks that provide financing against invoices are able to do so more efficiently as uniformity is increased. Plainly, the greatest efficiencies for suppliers, buyers and banks would result from uniform systems across large areas, but market forces may favour uniformity less strongly than such barriers as national borders and regulations disfavour it.

28. Government involvement in electronic invoicing standards may advance related areas of electronic commerce law, such as retention of records and electronic signatures: if invoices recognized for tax purposes are electronic, then electronic record retention must be addressed, and if those invoices must be signed or stamped by the supplier, then electronic signatures or other electronic authentication must be addressed. States have established very different requirements that have made it difficult for uniform approaches to electronic invoicing that have the potential for significant cost savings to be adopted by businesses even in a single industry. These included the potential for electronic invoices to be rejected by national tax agencies, as well as concerns about cross-border recognition of electronic signatures, to the extent that they are required for the validity of an electronic invoice. Indeed, several countries that have introduced legislation to enable electronic invoicing have either expressly mandated that electronic invoices be signed electronically—sometimes even prescribing the type of signature to be used—or indirectly required the use of an authentication method by subjecting electronic invoices to a minimum level of control over the authenticity and integrity of the invoice data.

### 2. Justification and proposed approach

29. The introduction of electronic invoices and related aspects of electronic supply chains poses a number of technical and business management challenges. From a legal point of view, however, it seems that there are mainly two orders of possible problems: (a) how to ensure the authenticity and integrity of the electronic invoice; and (b) how to meet record-retention requirements. These issues are not novel to UNCITRAL, as they were dealt with in the provisions on electronic signatures and electronic equivalents of "original" documents and retention of electronic records in the UNCITRAL Model Law on Electronic Commerce (articles 8 and 10,

respectively). The conditions for functional equivalence between electronic records and paper-based "original" documents have more recently been spelled out in article 9, paragraphs 4 and 5, of the United Nations Convention on the Use of Electronic Communications in International Contracts. Nevertheless, a satisfactory solution to these issues, in an international context, would require, inter alia, a functioning system of cross-border recognition of electronic authentication methods.

30. A number of organizations have been working towards the formulation of standards for electronic invoicing and the development of electronic supply chains or related matters, in particular the UNECE (A/CN.9/598, paras. 31-32); WCO (A/CN.9/579, para. 52) and the European Union (A/CN.9/579, para. 38). Despite these efforts, it appears that the legal obstacles to the introduction of paperless supply chains at international scale would persist as long as the basic principles of the UNCITRAL Model Law on Electronic Commerce have not been universally implemented.

31. The Commission may wish to consider that it would be useful to include the issues of electronic invoices and electronic supply chains as part of its consideration of legal issues related to authentication and cross-border recognition of electronic signatures in a comprehensive reference document.

## D. Transfer of rights in tangible goods and other rights through electronic communications

### 1. The issues

32. Developing electronic equivalents of traditional, mainly paper-based, methods for transferring or creating rights in tangible goods or other rights may face serious obstacles where the law requires physical delivery of goods or of paper documents for the purpose of transferring property or perfecting security interests in such goods or in the rights represented by the document. The particular problem presented by electronic commerce is how to provide a guarantee of uniqueness (or singularity) equivalent to possession of a document of title or negotiable instrument. Techniques such as those based on a combination of time-stamping and other security techniques have come close to providing a technical solution to the problem of singularity. But until an entirely satisfactory solution has been found, electronic equivalents of paper-based negotiability may have to rely on "central registry" systems, in which a central entity manages the transfer of title from one party to the next

33. Legal obstacles arising from the existence of writing and signature requirements and the probative effect of electronic communications have already been settled in articles 5 to 10 of the UNCITRAL Model Law on Electronic Commerce. Matters pertaining to contract formation in an electronic environment are settled in articles 11 to 15 of the Model Law. Also, issues related to the use of electronic means of identification to meet signature requirements have been addressed in article 7 of the UNCITRAL Model Law on Electronic Commerce and are further dealt with in the draft UNCITRAL Model Law on Electronic Signatures. More recently, "writing", "signature" and "original" requirements were addressed in article 9 of the United Nations Convention on the Use of Electronic Communications in International Contracts

34. More significant seems to be the difficulty in establishing the functional equivalence between the transfer or creation method in a paper-based environment and its electronic analogous. Where the law requires physical delivery of goods for the purpose of transferring property or perfecting security interests in such goods, a mere exchange of electronic messages between the parties would not be sufficient for effectively transferring property or perfecting security interest, however evident the parties' intention to transfer the property or perfect the security interest might have been. Therefore, even in jurisdictions where the law recognizes the legal value and effectiveness of electronic messages or records, no such message or record could alone effectively transfer property or perfect a security interest without an amendment of the law governing transfer of property or perfection of security interests.

35. The prospects for developing electronic equivalents of acts of transfer or perfection might be more positive where the law has at least in part dispensed with the strict requirement of physical delivery, for instance, by attributing to certain symbolic acts the same effect as the physical delivery of certain goods. One such example may be where the law attributes to the transferee or secured creditor the constructive possession of the goods transferred or pledged by virtue of an act of the parties that confers on the transferee the means for claiming control over the goods. Conceivably, the law could attribute the same effect to the entry of the transfer agreement into a registry system administered by a trusted third party or to an acknowledgement sent by the party in physical possession of the goods that these are held to order of the transferee or the secured creditor.

36. As noted in earlier studies by the Secretariat,[8] surmounting the issues of writing and signature in an electronic context does not solve the issue of negotiability which has been said to be "perhaps the most challenging aspect" of implementing EDI in international trade practices.[9] Rights in goods represented by documents of title are typically conditioned by the physical possession of an original paper document (the bill of lading, warehouse receipt, or other similar document). Analyses of the legal basis for the negotiability of documents of title have indicated that "[t]here is generally no statutory means in place by which commercial parties, through the exchange of electronic messages, can validly transfer legal rights in the same manner possible with paper documents".[10] This conclusion is also essentially valid for rights represented by negotiable instruments. Moreover, "the legal regime of negotiable instruments ... is in essence based on the technique of a *tangible original paper document*, susceptible to immediate visual verification on the spot. In the present state of legislation, negotiability cannot be divorced from the physical possession of the original paper document".[11]

37. Thus, it has been said that one challenge in developing law to accommodate electronically transmitted documents of title "is to generate them in such a way that holders who claim due negotiation will feel assured that there is a document of title in existence, that it has no defects upon its face, that the signature, or some substitute therefor is genuine, that it is negotiable, and that there is a means to take control of the electronic document equivalent in law to physical possession".[12]

38. The development of electronic equivalents to documents of title and negotiable instruments would therefore require the development of systems by which transactions could actually take place using electronic means of communication. This result could be achieved through a registry system, where transactions would

be recorded and managed through a central authority, or through a technical device that ensures the singularity of the relevant data message. In the case of transactions that would have used transferable or quasi-negotiable documents to transfer rights which were intended to be exclusive, either the registry system or the technical device would need to provide a reasonable guarantee as to the singularity and the authenticity of the transmitted data.

### 2. Justification and proposed approach

39. The establishment of electronic equivalents to paper-based registration systems raises a number of particular problems. They include the satisfaction of legal requirements of record-keeping, the adequacy of certification and authentication methods, possible need of specific legislative authority to operate electronic registration systems, the allocation of liability for erroneous messages, communication failures, and system breakdowns; the incorporation of general terms and conditions; and the safeguarding of privacy. To some extent, most of these issues are akin to issues discussed above in connection with authentication and cross-border recognition of electronic signatures (see paras. 7-13) or with liability and standards of conduct of information service providers (see paras. 18-21) above.

40. The Organization of American States (OAS) has pursued a number of initiatives related to the transfer of rights in tangible goods in recent years that involve the potential use of electronic communications. In 2002 the OAS adopted the Inter-American Uniform Through Bill of Lading for the International Carriage of Goods by the Road (Negotiable)[13] at its 6th Inter-American Specialized Conference on Private International Law (CIDIP VI[14]), held in Washington D.C. A key objective for creating this uniform bill of lading was to unify contract law in this area so as to enhance the predictability in the legal process related to the transportation of import and export goods when the mode of transportation is by road.[15] OAS has further adopted a Model Inter-American Law on Secured Transactions,[16] including an appendix on electronic documents and signatures. Issues related to electronic equivalent of maritime transport documents are also under consideration by UNCITRAL Working Group III (Transport Law), in the context of the negotiations of a draft new instrument on the carriage of goods wholly or partly by sea. Apart from these initiatives, the issues described above do not seem to be currently considered by other international organizations.

41. The Commission may wish to consider that the above constitutes an additional reason for including the issues of authentication and cross-border recognition of electronic signatures in a comprehensive reference document.

## E. Unfair competition and deceptive trade practices in electronic commerce

### 1. The issues

42. Another policy concern is to limit fraudulent, misleading and unfair commercial practices in electronic commerce. Electronic communication permits new forms of advertising and marketing that may pose new threats to the interests of consumers as well as the functioning of the competition process. Unfair competition

law will protect these interests but legal evaluation of practices in conventional commerce cannot always be transferred to the digital environment.

43. Main features of electronic commerce on the Internet, such as interactivity, uniformity of format, and distribution in networks, allow for a convergence of mass communication and individualized communication, leading to constant renewal of forms of marketing and advertising. Advertising on the Net includes forms of banner advertising with remuneration calculated on the basis of page impressions or ad clicks. Other forms of advertisements include information that load between two content pages, either as small format pop-ups or full-page advertisements. Depending on the manner they are used, such techniques may raise issues of the separation of advertising from editorial parts of media, or may mislead customers and users to purchase services not originally intended. Unfair practices may also involve search engines, which have become the main service for users to cope with the enormous amount of information present on the Net, or use of hyperlinks for misappropriation or deceptive comparative advertising.

### 2. Justification and proposed approach

44. The issues described above may affect domestic and international electronic commerce in many ways. Lack of appropriate rules, guidelines or voluntary codes of conduct, or even the perception of insufficient legal protection, undermine confidence in electronic commerce and constitute an obstacle to its development. Conflicting standards across borders may also affect the offer of goods and services, as business entities operating under a less developed or excessively tolerant framework may enjoy an unfair competitive advantage, as compared to companies required to comply with more stringent requirements. In some cases, operations under a more lenient legal framework may be favoured by business entities interested in shielding themselves from liability that may arise under more stringent regimes. The interest of attracting investment by these companies may need to be weighed against the risk that the host country might be perceived as a safe harbour for unfair business practices, which may damage the reputation of an entire business sector.

45. The issues described above have been under consideration by a number of international organizations, including OECD,[17] the European Union (A/CN.9/579, para. 35); APEC (A/CN.9/579, para. 24; A/CN.9/598, para. 16), the Commonwealth secretariat (A/CN.9/579, para. 27; A/CN.9/598, paras. 18-20) and the ICC (A/CN.9/579, paras. 53-56). Not all organizations deal with every aspect of these issues and the perspective from which each organization discusses them is not necessarily identical. This variety of sources and diversity of approaches does not facilitate the task of legislators and policymakers interested in establishing a sound legal framework for consumer protection in electronic commerce, in particular in developing countries.

46. The Commission may wish to consider that it would be useful to include issues of unfair competition and deceptive trade practices in electronic commerce in a comprehensive reference document.

## F. Privacy and data protection in electronic commerce

### 1. The issues

47. Data protection and privacy are concepts that have been acknowledged in most parts of the world, sometimes even on a constitutional law level. However, the level of protection as well as the legal instruments used to enforce it still vary considerably. With the advent of the computer there was a "first wave" of data protection initiatives in the seventies. With the spreading use of the Internet and the increased technical potential for collecting and transmitting data in electronic commerce, the protection of personal data has gained renewed attention. Practices like data mining or data warehousing as well as the placement of "cookies" are widely used in electronic commerce.

48. Data protection and privacy rules may serve the interests of user as well as of business but also have to be weighed against conflicting interests. The lack of consumer trust and confidence in the privacy and security of online transactions and information networks is seen as an element possibly preventing economies from gaining all of the benefits of electronic commerce. On the other hand, regulatory systems restricting the flow of information can have adverse implications for global business and economies.

49. The key elements in the international discussion on principles of data protection are concerned with consent to data collection, adequate relation to the purpose, time limitation of storage, adequate level of protection in third countries to which transmission takes place, information and correction claims for users, and enhanced protection for sensitive data. New issues and restrictions on data protection arise from international security concerns, which have led to legislative actions directed at data retention. With a growing stock of international rules these do not only become more heterogeneous but also make it more difficult for companies to comply. As these standards consider conflicting interests the delineation of the field of application of these instruments as well as which of the interests protected will prevail in a specific case is gaining growing importance.

### 2. Justification

50. The issues described above may affect domestic and international electronic commerce in many ways. Lack of appropriate rules, guidelines or voluntary codes of conduct, or even the perception of insufficient legal protection, undermine confidence in electronic commerce and constitute an obstacle to its development. Conflicting standards across borders may also affect the offer of goods and services, as business entities operating under a less developed or excessively tolerant framework may enjoy an unfair competitive advantage, as compared to companies required to comply with more stringent requirements. In some cases, operations under a more lenient legal framework may be favoured by business entities interested in shielding themselves from liability that may arise under more stringent regimes. The interest of attracting investment by these companies may need to be weighed against the risk that the host country might be perceived as a safe harbour for unfair business practices, which may damage the reputation of an entire business sector.

51. The issues described above have been under consideration by a number of international organizations, including OECD,[18] the European Union (A/CN.9/579, para. 32); APEC (see A/CN.9/579, paras. 22-23; A/CN.9/598, para. 17), the Council of Europe (see A/CN.9/579, para. 30); the Commonwealth secretariat (A/CN.9/579, para. 27; A/CN.9/598, paras. 18-20) and the ICC (A/CN.9/579, paras. 53-56). Not all organizations deal with every aspect of these issues and the perspective from which each organization discusses them is not necessarily identical. This variety of sources and diversity of approaches does not facilitate the task of legislators and policymakers interested in establishing a sound legal framework for consumer protection in electronic commerce, in particular in developing countries.

52. The Commission may wish to consider that it would be useful to include the issues of privacy and data protection in electronic commerce in a comprehensive reference document.

## G. Other elements for a sound legal framework for electronic commerce

### 1. Protection of intellectual property rights

53. Modern means of communication have had a significant impact in the way some intellectual property rights are defined and have challenged traditional enforcement mechanisms.

54. Copyright has been closely intertwined with the features of the production, reproduction, and distribution of works from the outset. Hence, the advent of a uniform digital format as well as digital networks poses a challenge for the specific characteristics of copyright as to subject matter, scope of rights, and enforcement as new technological possibilities and related innovative business models develop. All kinds of protected materials are now distributed and traded over digital networks. The first challenge for the legal framework is to adapt to new technological and economic developments. This concerns the scope of rights with respect to digital distribution as well as the extent of limitations to copyright. Also, certain kinds of information goods may obtain increased importance in a digital environment calling for increased protection. The protection of databases can be seen as an example. Digital networks pose a threat to traditional distribution channels and economic models as well as to existing systems of collective management. Finally, moral rights that were not in the focus of the earlier phases of computerization, which emphasized software protection, are now increasingly gaining importance with respect to the creation and distribution of works over the Internet.

55. Trademarks have an important function in commerce that is equally present in electronic commerce. While there is consensus that trademark law should apply to electronic commerce the same way as to traditional means of communication problems arise from the fact that the provisions of trademark law and protection of related signs are not tailored to the features of the new medium. Pertinent issues include: use of trademarks as meta tags, sale of trademarks as keywords, linking and framing. Further issues deriving more from "conventional" use of trademarks and related to the issue of cross-border communication as opposed to the territorial nature of trademark systems include the acquisition as well as infringement of trademark rights through use of signs on the Internet.

56. Another illustration of the impact of electronic commerce on the traditional system for protecting intellectual property rights concerns domain names. Domain names are a necessity of today's user-friendly information retrieval in the Internet. The economic value of a concise and characteristic domain cannot be underestimated. Due to this, many conflicts over certain Internet-domains have arisen. Patent law is another area affected by modern means of communication, with software patents playing an increasing role in electronic commerce.

57. States interested in developing an appropriate legal framework for electronic commerce would be well advised to consider carefully the intellectual property implications of the use of modern information and communication technologies. WIPO is the driving force in the international field for developing a framework for the protection of intellectual property. Due to the technical development much of the activity is now related to the digital environment. WIPO has a comprehensive working agenda on all aspects of intellectual property in electronic commerce. The organization's expertise and universal membership ensures the broad acceptability of the international standards set by WIPO.

### 2. Consumer protection in electronic commerce

58. Domestic rules on consumer protection are typically based on concerns about information asymmetries as well as a lack of negotiating power on the side of the consumer. While media such as the Internet offer convenient alternatives to traditional purchase methods, one of the main barriers to electronic commerce taking off has been the lack of consumer confidence due to uncertainties in the use of electronic media for contracting.

59. Information asymmetries are exacerbated in electronic commerce, as consumers lack vital information concerning the product, which the consumer cannot inspect physically. Consumers also have virtually no information concerning vendors and have little means to verify their identities and the standing of their business. Moreover, the features of the technical means used for the transaction may not be familiar to the consumer resulting in unintended communications. Also, there are fears that as the vendor provides the technical system it may be able to construe key features in its favour leaving the consumer in a weaker position in the transaction process. Legal uncertainties in cross-border transactions arise with respect to the applicable law and efficient ways to assert consumer claims.

60. The issues described above may affect domestic and international electronic commerce in many ways. Lack of appropriate rules, guidelines or voluntary codes of conduct, or even the perception of insufficient legal protection, undermine confidence in electronic commerce and constitute an obstacle to its development. Conflicting standards across borders may also affect the offer of goods and services, as business entities operating under a less developed or excessively tolerant framework may enjoy an unfair competitive advantage, as compared to companies required to comply with more stringent requirements. In some cases, operations under a more lenient legal framework may be favoured by business entities interested in shielding themselves from liability that may arise under more stringent regimes. The interest of attracting investment by these companies may need to be weighed against the risk that the host country might be perceived as a safe harbour for unfair business practices, which may damage the reputation of an entire business sector.

### 3. Unsolicited electronic communications (spam)

61. New technical means of communication, such as e-mail messaging, have also exacerbated the problems posed by unsolicited commercials. A number of countries have adopted legal instruments to combat spam. The first problem confronting anti-spam legislation is a definition of and delineation between legitimate commercial messaging and undesired spamming. Enforcement of legal anti-spam measures has proven problematic, due to the number of enforcement agencies and the variety of their powers, limitations on gathering information and sharing information as well as producing the necessary evidence, and limited enforceability across borders due to lack of national jurisdiction over cross-border spam and of appropriate measures for cross-border enforcement at the operational level.

### 4. Cybercrime

62. Use of modern information and communication technologies has provided new means for criminal, fraudulent or indecent activities, such as embezzlement of funds, slander, industrial espionage, violation of trade secrets or dissemination of child pornography. At the same time, new types of criminal conduct have emerged, such as identity theft, dissemination of computer viruses, or intentional breakdown of computer and information services. Besides their criminal character, all these activities may significantly affect international trade by causing physical loss or moral damage to individuals and business entities and by undermining business and consumer confidence in electronic commerce. The establishment of an effective legal framework for preventing and persecuting computer crime and cybercrime, for example, as provided for in the Convention on CyberCrime adopted by the Council of Europe[19] and its Protocol,[20] is therefore an essential component of domestic and international strategies to promote electronic commerce.

## III. Proposed nature of future work

63. The Commission may wish to consider that it would be useful to include the issues described in Part II, sections A to F, as well as other related issues in a comprehensive reference document. The document would describe in some detail the issues discussed above and the solutions being offered or proposed by the various organizations that have worked in this area. The Secretariat proposes that the legislative guidance document should take a narrative and neutral approach to issues dealt with by other organizations and should not be intended as a comparative evaluation of the solutions proposed by them. Neither should the document offer its own advice as an alternative to or substitute for the advice of other organizations.

64. The Secretariat proposes a different approach as regards issues related to intellectual property rights, which are described in Part II, paragraphs 53-57 above, and which have been extensively treated at a universal level under the auspices of WIPO. In respect of those issues, the Commission may wish to consider that it would be worth mentioning them in any comprehensive reference document that the Commission might wish to prepare, although in a somewhat summary form, with a view to drawing the attention of legislators and policymakers to the importance of establishing an appropriate legal framework for the protection of intellectual property rights in electronic commerce.

65. As regards issues related to consumer protection, unsolicited commercial communications, cybercrime and computer crime, which are described respectively in Part II, paragraphs 64 and 65 above, the Secretariat proposes to treat those topics in a similarly abbreviated manner that would highlight their importance and refer to ongoing and completed work by the relevant organizations.

*Notes*

[1] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 17* (A/60/17), paras 213-215.

[2] For the text of the Model Law, see *Official Records of the General Assembly, Fifty-first Session, Supplement No. 17* (A/51/17), annex I. The Model Law and its accompanying Guide to Enactment have been published as a United Nations publication (Sales No. E.99.V.4).

[3] For the text of the Model Law, see *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17* (A/56/17), annex II. The Model Law and its accompanying Guide to Enactment have been published as a United Nations publication (Sales No. E.02.V.8).

[4] For the text of the Convention, see the Annex to General Assembly resolution 60/21, of 23 November 2005.

[5] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 17* (A/60/17), para. 213.

[6] Ibid., para. 214.

[7] Ibid., para. 214.

[8] A/CN.9/WG.IV/WP.69 (*Yearbook of the United Nations Commission on International Trade Law* (UNCITRAL Yearbook), vol. XXVII: 1996 (Sales No.: E.98.V.7), part two, chap. II, sect. B), para. 55; A/CN.9/WG.IV/WP.90 (UNCITRAL Yearbook, vol. XXXII: 2001 (Sales No.: E.04.V.4) part two, chap. II, sect. F), para. 35.

[9] See Jeffrey B. Ritter and Judith Y. Gliniecki, "International Electronic Commerce and Administrative Law: The Need for Harmonized National Reforms", Harvard Journal of Law and Technology, vol. 6 (1993), p. 279.

[10] Ibid.

[11] See K. Bernauw, "Current developments concerning the form of bills of lading—Belgium", Ocean Bills of Lading: Traditional Forms, Substitutes and EDI Systems, A. N. Yannopoulos, editor (The Hague, Kluwer Law International, 1995), p. 114.

[12] Donald B. Pedersen, "Electronic data interchange as documents of title for fungible agricultural commodities", Idaho Law Review, vol. 31 (1995), p. 726.

[13] Inter-American Uniform Through Bill of Lading for the International Carriage of goods by the Road (Negotiable), available at http://www.oas.org/DIL/CIDIP-VI-billoflanding-Eng.htm.

[14] Conferencias Especializadas Interamericanas sobre Derecho Internacional Privado.

[15] See, "Summary" at http://www.oas.org/DIL/CIDIP-VI-billoflanding-Eng_summary.htm. Two areas of this convention deal with electronic issues. First, Article 2 defines a "Writing" as including "a written document, a telegram, telex, telephonic facsimile (fax), electronic data interchange, or a document created or transferred by electronic means" [emphasis added]. Additionally, article 18.1 of this treaty provides for the possibility of electronic signatures, as well as other signature types, if authorized by applicable law.

[16] http://www.oas.org/DIL/CIDIP-VI-securedtransactions_Eng.htm. This Model Law was approved by the Plenary meeting of delegates on 8 February 2002 as resolution CIDIP-VI/RES.5/02, which can be accessed at http://www.oas.org/main/main.asp?sLang=E&sLink= http://www.oas.org/dil/. The Model Law itself may be accessed (in Spanish and English) at http://www.oas.org/dil/Annex_cidipviRES.%205-02.pdf. (Last visited, 12 April 2006.)

[17] See the OECD, Ministerial Declaration on Consumer Protection in the Context of Electronic Commerce of 8-9 October 1998, http://www.oecd.org/LongAbstract/0,2546,en_2649_34267_1865273_119672_1_1_1,00.html (10.3.2006).

[18] See OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, applicable on 23 September 1980: http://www.oecd.org/document/18/0,2340,en_2649_34255_1815186_1_1_1_1,00.html. See further the OECD "Privacy Policy Generator" (http://www.oecd.org/document/39/0,2340,en_2649_34255_28863271_1_1_1_1,00.html).

[19] The CyberCrime Convention, ETS 185, entered into force on 1 July 2004. It is intended to develop a common criminal policy aimed at the protection of society against cybercrime, inter alia, by adopting appropriate criminal legislation and fostering international cooperation. *Source*: Council of Europe Treaty Office, http://conventions.coe.int/.

[20] The Additional Protocol to the Convention on Cybercrime Concerning the Criminalization of Acts of a Racist and Xenophobic Nature supplements, as between the Parties to the Protocol, the provisions of the Convention on Cybercrime as regards the criminalization of acts of a racist and xenophobic nature committed through computer systems (ETS 189). It was opened for signature in Strasbourg on 28 January 2003. Source: Council of Europe Treaty Office, http://conventions.coe.int/.

United Nations A/CN.9/605

General Assembly

Distr.: General
25 April 2006

Original: English

**United Nations Commission on International Trade Law**
Thirty-ninth session
New York, 19 June-7 July 2006

# Settlement of commercial disputes

## Interim measures

**Note by the Secretariat**

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## Introduction

1. At its thirty-second session (Vienna, 17 May-4 June 1999), the Commission decided that one of the priority items for the Working Group should be enforceability of interim measures of protection.[1]

2. The Working Group considered the possible preparation of harmonized texts on interim measures at its thirty-second (Vienna, 20-31 March 2000),[2] thirty-third (Vienna, 20 November-1 December 2000),[3] thirty-fourth (New York, 21 May-1 June 2001),[4] thirty-sixth (New York, 4-8 March 2002),[5] thirty-seventh (Vienna, 7-11 October 2002),[6] thirty-eighth (New York, 12-16 May 2003),[7] thirty-ninth (Vienna, 10-14 November 2003),[8] fortieth (New York, 23-27 February 2004),[9] forty-first (Vienna, 13-17 September 2004),[10] forty-second (New York, 10-14 January 2005),[11] forty-third (Vienna, 3-7 October 2005)[12] and forty-fourth (New York, 23-27 January 2006)[13] sessions.

3. At its forty-fourth session, the Working Group agreed that the legislative provisions on interim measures and preliminary orders be placed in a new chapter, numbered chapter IV bis of the UNCITRAL Model Law on International Commercial Arbitration ("the Arbitration Model Law").[14]

# I. Draft legislative provisions on interim measures and preliminary orders

4. The text of chapter IV bis on interim measures and preliminary orders, as adopted by the Working Group at its forty-fourth session,[15] reads as follows:

## Chapter IV bis. Interim measures and preliminary orders

### Section 1—Interim measures

#### Article 17—Power of arbitral tribunal to order interim measures

(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.

(2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

(a) Maintain or restore the status quo pending determination of the dispute;

(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;

(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or

(d) Preserve evidence that may be relevant and material to the resolution of the dispute.

**Article 17 bis—Conditions for granting interim measures**

(1) The party requesting an interim measure under article 17 (2)(a), (b) and (c) shall satisfy the arbitral tribunal that:

(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim, provided that any determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

(2) With regard to a request for an interim measure under article 17 (2)(d), the requirements in paragraphs (1)(a) and (b) of this article shall apply only to the extent the arbitral tribunal considers appropriate.

**Section 2—Preliminary orders**

**Article 17 ter—Applications for preliminary orders and conditions for granting preliminary orders**

(1) Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.

(2) The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.

(3) The conditions defined under article 17 bis apply to any preliminary order, provided that the harm to be assessed under article 17 bis, paragraph (1)(a), is the harm likely to result from the order being granted or not.

**Article 17 quater—Specific regime for preliminary orders**

(1) Immediately after the arbitral tribunal has made a determination in respect of an application for a preliminary order, the arbitral tribunal shall give notice to all parties of the request for the interim measure, the application for the preliminary order, the preliminary order, if any, and all other communications, including by indicating the content of any oral communication, between any party and the arbitral tribunal in relation thereto.

(2) At the same time, the arbitral tribunal shall give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practicable time.

(3) The arbitral tribunal shall decide promptly on any objection to the preliminary order.

(4) A preliminary order shall expire after twenty days from the date on which it was issued by the arbitral tribunal. However, the arbitral tribunal may issue an interim measure adopting or modifying the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.

(5) A preliminary order shall be binding on the parties but shall not be subject to enforcement by a court. Such a preliminary order does not constitute an award.

**Section 3—Provisions applicable to interim measures and preliminary orders**

**Article 17 quinquies—Modification, suspension, termination**

The arbitral tribunal may modify, suspend or terminate an interim measure or a preliminary order it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

**Article 17 sexies—Provision of security**

(1) The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

(2) The arbitral tribunal shall require the party applying for a preliminary order to provide security in connection with the order unless the arbitral tribunal considers it inappropriate or unnecessary to do so.

**Article 17 septies—Disclosure**

(1) The party requesting an interim measure shall promptly disclose any material change in the circumstances on the basis of which the measure was requested or granted.

(2) The party applying for a preliminary order shall disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal's determination whether to grant or maintain the order, and such obligation shall continue until the party against whom the order has been requested has had an opportunity to present its case. Thereafter, the applying party shall have the same disclosure obligation with respect to the preliminary order that a requesting party has with respect to an interim measure under paragraph (1) of this article.

**Article 17 octies—Costs and damages**

The party requesting an interim measure or applying for a preliminary order shall be liable for any costs and damages caused by the measure or the order to any party if the arbitral tribunal later determines that, in the circumstances, the measure or the order should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

**Section 4—Recognition and enforcement of interim measures**

**Article 17 novies—Recognition and enforcement**

(1) An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article 17 decies.

(2) The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension or modification of that interim measure.

(3) The court of the State where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.

**Article 17 decies—Grounds for refusing recognition or enforcement***

(1) Recognition or enforcement of an interim measure may be refused only:

(a) At the request of the party against whom it is invoked if the court is satisfied that:

(i) Such refusal is warranted on the grounds set forth in article 36, paragraphs (1) (a)(i), (ii), (iii) or (iv); or

(ii) The arbitral tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or

(iii) The interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the State in which the arbitration takes place or under the law of which that interim measure was granted; or

(b) If the court finds that:

* The conditions set forth in article 17 decies are intended to limit the number of circumstances in which the court may refuse to enforce an interim measure. It would not be contrary to the level of harmonization sought to be achieved by these model provisions if a State were to adopt fewer circumstances in which enforcement may be refused.

(i) The interim measure is incompatible with the powers conferred upon the court unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or

(ii) Any of the grounds set forth in article 36, paragraphs (1)(b)(i) or (ii), apply to the recognition and enforcement of the interim measure.

(2) Any determination made by the court on any ground in paragraph (1) of this article shall be effective only for the purposes of the application to recognize and enforce the interim measure. The court where recognition or enforcement is sought shall not, in making that determination, undertake a review of the substance of the interim measure.

**Section 5—Court-ordered interim measures**

**Article 17 undecies—Court-ordered interim measures**

The court shall have the same power of issuing interim measures for the purposes of and in relation to arbitration proceedings whose place is in the country of the court or in another country as it has for the purposes of and in relation to proceedings in the courts and shall exercise that power in accordance with its own rules and procedures insofar as these are relevant to the specific features of an international arbitration.

## II. Remarks on the draft legislative provisions on interim measures and preliminary orders

**Remarks on section 1—Interim measures**

*Article 17, paragraph (2)*

*Form of issuance of an interim measure*

5. At its thirty-sixth (New York, 4-8 March 2002),[16] thirty-seventh (Vienna, 7-11 October 2002)[17] and fortieth (New York, 23-27 February 2004)[18] sessions, the Working Group considered at length the form in which an interim measure should be issued by an arbitral tribunal. The Working Group agreed that the phrase "whether in the form of an award or in another form", which was inspired from the UNCITRAL Arbitration Rules, was sufficiently neutral to reflect the intention of the Working Group not to create any preferred form in which an interim measure should be issued. It was said that it would be undesirable for the draft paragraph to be overly prescriptive in respect of the form that an interim measure should take. The Commission might wish to note the suggestion that any explanatory material to be prepared, possibly in the form of a guide to enactment and use of the new legislative provisions, make it clear that the wording adopted should not be misinterpreted as taking a stand in respect of the issue as to whether or not an interim measure issued in the form of an award would qualify for enforcement under the New York Convention (see below, para. 17).[19]

*Exhaustive nature of the list of functions characteristic of interim measures*

6. At its thirty-sixth (New York, 4-8 March 2002)[20] and thirty-ninth (Vienna, 10-14 November 2003)[21] sessions, the Working Group considered whether all possible grounds for which an interim measure might need to be granted were covered by the current formulation under article 17, paragraph (2). After discussion, the Working Group agreed that, to the extent that all the purposes for interim measures were generically covered by the revised list contained in paragraph (2), the list could be expressed as an exhaustive one.[22] The Commission might wish to note the decision of the Working Group to provide explanation on that matter in any explanatory material accompanying that provision.

*Article 17 bis*

7. At its forty-third session (Vienna, 3-7 October 2003), the Working Group agreed to retain the word "adequately" in subparagraph (a) of article 17 bis (1) and to clarify, in any explanatory material, that the subparagraph should be interpreted in a flexible manner by balancing the degree of harm suffered by the applicant if the interim measure was not granted against the degree of harm suffered by the party opposing the measure if that measure was granted.[23]

8. It was suggested as well that explanatory material accompanying article 17 bis could indicate that the fact that the requirements in paragraphs (1)(a) and (b) of article 17 bis only applied to the type of measure contained in paragraph (2)(d) of article 17 to the extent the arbitral tribunal considered appropriate did not mean that an arbitral tribunal would not examine and weigh the circumstances in determining the appropriateness of ordering the measure.[24]

*"Urgent need for the measure"*

9. The Working Group considered, after discussion, that the need for urgency should not be a general feature of interim measures.[25] The Commission might wish to decide whether guidance should be provided in explanatory material indicating how urgency impacts upon the operation of the provisions in Section 1.

**Remarks on section 2—Preliminary orders**

*General remarks*

10. At its forty-first (Vienna, 13-17 September 2004),[26] and forty-second (New York, 10-14 January 2005)[27] sessions, the Working Group undertook a detailed review of the provisions regarding the power of an arbitral tribunal to grant interim relief on an ex parte basis. In the legislative provisions, the term "preliminary order" is used, instead of "interim measure", to describe a measure issued on an ex parte basis. This term emphasizes the temporary and extraordinary nature of the order, as well as its distinct scope and purpose.

11. At its forty-second session (New York, 10-14 January 2005), after extended discussion, the Working Group agreed to include a compromise text of the provisions on preliminary orders, on the basis of the principles that: those provisions would apply unless otherwise agreed by the parties; it be made clear that preliminary orders had the nature of procedural orders and not of awards; and no enforcement procedure would be provided for such orders in section 4.[28]

*Article 17 ter*

*Purpose, function and legal regime of preliminary orders*

12. At the forty-first session of the Working Group (Vienna, 13-17 September 2004), doubts were expressed as to whether or not the notion of "preliminary order" should be regarded as a subset of the broader notion of "interim measure". It was suggested that, if a preliminary order was understood to be a subset of an interim measure, then the distinction between them might be regarded as artificial and might lead to difficulties in implementation and practice.[29] The Working Group noted that, although a preliminary order might be regarded as a subset of an interim measure, it should be distinguished from an interim measure in view of its narrower purpose, which was limited to preventing the frustration of the specific interim measure being applied for. Another distinctive feature of a preliminary order was that it was subject to strict time limits as set out in article 17 quater. It was stated that a preliminary order was effectively to provide a "bridging device" until an inter partes hearing could take place in respect of the requested interim measure.[30] The Commission might wish to decide whether explanatory material accompanying article 17 ter should include an explanation of the distinction between an interim measure and a preliminary order.

13. At the forty-second session of the Working Group (New York, 10-14 January 2005), it was said that article 17 ter could be misunderstood as providing that the arbitral tribunal could only direct the parties in general terms not to frustrate the purpose of the interim measure. Notwithstanding that view, it was understood that the arbitral tribunal had a more general discretion to issue a preliminary order that was appropriate and was in keeping with the circumstances of the case and that such an understanding should be made clear in any explanatory material.[31]

*Article 17 quater*

*Obligation of arbitral tribunal to give notice (article 17 quater, paragraph (1))*

14. At the forty-second session of the Working Group (New York, 10-14 January 2005), it was noted that the arbitral tribunal had an obligation to communicate documents and information to the party against whom the preliminary order was sought and it was suggested that it be clarified that that obligation applied whether the arbitral tribunal issued or refused to issue the order. The Commission might wish to note that the Working Group agreed that clarification of that obligation might be included in any explanatory material accompanying article 17 quater.[32]

*Non-enforceability of preliminary orders (article 17 quater, paragraph (5))*

15. The Working Group considered at length whether an enforcement regime should be provided in respect of preliminary orders. The need for including such a regime was questioned given the temporary nature of a preliminary order[33] and the fact that it could raise practical difficulties, such as whether notification to the other party of the preliminary order should be deferred until after the order had been enforced by a court.[34] The Commission might wish to note that non-enforceability of preliminary orders was central to the compromise reached at the forty-second session of the Working Group (see above, paragraph 11).

*Recourse to courts*

16. The Commission might wish to consider a proposal made at the forty-fourth session of the Working Group (New York, 23-27 January 2006) to add the following text to paragraph (5) of article 17 quater: "a party shall not be prevented from seeking any relief in a court because it has obtained such a preliminary order from the arbitral tribunal". The Working Group took note of that proposal. It was suggested that this proposal merely clarified the operation of the provision and did not seek to reopen substantive questions relating thereto.[35]

**Remarks on section 4—Recognition and enforcement of interim measures**

*Interplay between section 4 and articles 35 and 36*

17. Article 17 decies, which deals with the grounds for refusing recognition and enforcement of interim measures, refers to article 36, paragraph (1), of the Arbitration Model Law which is expressed to apply to awards. It is recalled that the Working Group decided not to define the form in which an interim measure should be issued (see above, para. 5), and the purpose of article 17 decies is to define the grounds for non-enforcement of interim measures, whether issued in the form of an award or in another form. The Commission might wish to consider whether it is necessary to clarify that the reference in article 17 decies to article 36, paragraph (1) should be understood as a reference to the grounds for non-enforcement, regardless of the form of issuance of the interim measure.[36]

*Article 17 decies, paragraph 1*

*Burden of proof*

18. In contrast to article 36, paragraph (1)(a), of the Arbitration Model Law which places the burden of proof on the party against whom the award is invoked, article 17 decies, paragraph (1)(a) reflects the decision of the Working Group that no provision should be made regarding the allocation of the burden of proof and that that matter should be left to applicable law.[37] The Commission might wish to note the decision of the Working Group to provide explanation on that matter in any explanatory material accompanying that provision.

*"modified, terminated or suspended"*

19. The Commission might wish to note that the Working Group agreed that any explanatory material accompanying article 17 decies should clarify that the enforcement regime set out in section 4 applied in respect of any interim measure, whether or not it was modified by the arbitral tribunal.[38]

*Interplay between article 17 decies, paragraph (1)(a)(iii) and article 34*

20. The Commission might wish to decide whether clarification is needed on the issue of whether an interim measure issued in the form of an award could be set aside under article 34 of the Arbitration Model Law. It is recalled that that question was raised at the fortieth session of the Working Group (New York, 23-27 February 2004) in the context of a discussion on whether the effect of article 17 decies, paragraph (1)(a)(iii) would be to allow a State court to set aside an interim measure issued by an arbitral tribunal. The Working Group agreed that article 17 decies,

paragraph (1)(a)(iii) should not be misinterpreted as creating a ground for State courts to set aside an interim measure issued by an arbitral tribunal.[39]

*Article 17 decies, paragraph 2*

21. The Commission might wish to recall that concerns were expressed in the Working Group that, when a court was called upon to enforce an interim measure, under article 17 decies, paragraph (1)(a)(i) (which refers to the grounds set forth in article 36, paragraphs (1)(a)(i), (ii), (iii) or (iv)), its decision could have an effect beyond the limited sphere of recognition and enforcement of the interim measure and, for example, impact on the recognition and enforcement of the arbitral award that determines the merits of the case. The purpose of article 17 decies, paragraph (2) is to confine the power of a court to the determination of recognition and enforcement of the interim measure only.[40]

**Remarks on section 5—Court-ordered interim measures**

**Article 17 undecies**

*Placement of article 17 undecies*

22. The Commission might wish to note that the Working Group considered whether article 17 undecies should be located in another part of the Arbitration Model Law given that it deals with court-ordered interim measures which might not easily fit into a chapter intended to deal mostly with interim measures granted by arbitral tribunals. The Working Group agreed that a text suggesting that States place article 17 undecies in the most appropriate part of their enacting legislation[41] could be included in explanatory material accompanying that provision along the lines of the text suggested in the note by the Secretariat.[42]

## III. Amendment to article 1, paragraph (2), of the Arbitration Model Law

23. At its forty-third session (Vienna, 3-7 October 2005), the Working Group noted that, given the intention that the provision on court-ordered interim measures should apply irrespective of the State where the arbitration took place, that provision should be added to the list of articles contained under article 1, paragraph (2), of the Arbitration Model Law. That article provides that, in respect of the listed articles, the Arbitration Model Law, as enacted in a given State, applies even if the place of the arbitration is not in the territory of that State.[43] It was also suggested that a reference to articles 17 novies and 17 decies (which deal with recognition and enforcement of interim measures and the grounds for refusal thereof, respectively) should be included within the list of excepted articles so that article 1, paragraph (2), of the Arbitration Model Law would read as follows:

> "(2) The provisions of this Law, except articles 8, 9, 17 novies, 17 decies, 17 undecies, 35 and 36, apply only if the place of arbitration is in the territory of this State."

## IV. Explanatory material

24. The Commission might wish to discuss the decision of the Working Group that explanatory material in relation to the legislative provisions on interim measures and preliminary orders could be drafted along the lines of the existing explanatory note to the Arbitration Model Law and that such text could replace the current paragraph 26 and other affected paragraphs of that explanatory note. In addition, the Secretariat was requested to provide more detailed information on interim measures and preliminary orders to enacting States in a guide to enactment and use of the revised provisions.[44]

*Notes*

[1] *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17* (A/54/17), paras. 371-373 and para. 380.

[2] A/CN.9/468, paras. 60-87.

[3] A/CN.9/485, paras. 78-106.

[4] A/CN.9/487, paras. 64-87.

[5] A/CN.9/508, paras. 51-94.

[6] A/CN.9/523, paras. 15-80.

[7] A/CN.9/524, paras. 15-78.

[8] A/CN.9/545, paras. 19-112.

[9] A/CN.9/547, paras. 12-116.

[10] A/CN.9/569, paras. 12-68.

[11] A/CN.9/573, paras. 11-95.

[12] A/CN.9/589, paras. 11-107.

[13] A/CN.9/592, paras. 12-45 and annex I.

[14] Ibid., para. 14.

[15] Ibid., paras. 12-45 and annex I.

[16] A/CN.9/508, paras. 65-68.

[17] A/CN.9/523, para. 36.

[18] A/CN.9/547, paras. 70-72.

[19] Ibid.

[20] A/CN.9/508, para. 71.

[21] A/CN.9/545, para. 21.

[22] Ibid.

[23] A/CN.9/589, para. 37.

[24] Ibid., para. 33.

[25] A/CN.9/523, para. 41.

[26] A/CN.9/569.

[27] A/CN.9/573.

[28] Ibid., para. 27.

[29] A/CN.9/569, para. 24.

[30] Ibid., para. 26.

[31] A/CN.9/573, para. 30.

[32] Ibid., para. 41.

[33] A/CN.9/547, para. 66.

[34] A/CN.9/569, paras. 46-51.

[35] A/CN.9/592, para. 27.

[36] A/CN.9/547, para. 43.

[37] Ibid., paras. 35-36, 42, 58 and 60; A/CN.9/573, para. 73.

[38] A/CN.9/589, para. 85.

[39] A/CN.9/547, para. 26.

[40] Ibid., para. 24.

[41] A/CN.9/592, paras. 40-42.

[42] A/CN.9/WG.II/WP.141, para. 13. The footnote reads as follows: "In enacting article 17 undecies, States might wish to consider grouping this provision with other provisions in the enacting legislation relating to certain functions of arbitration assistance and supervision performed by courts or other authority."

[43] A/CN.9/589, paras. 101-103.

[44] A/CN.9/592, para. 81.

United Nations A/CN.9/606

General Assembly

Distr.: General
13 April 2006

Original: English

**United Nations Commission on International Trade Law**
Thirty-ninth session
New York, 19 June-7 July 2006

# Settlement of commercial disputes

## Form of arbitration agreement

**Note by the Secretariat**

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V.06-53025 (E) 170506 170506

## Introduction

1. At its thirty-second session (Vienna, 17 May-4 June 1999), the Commission decided that one of the priority items for the Working Group should be the requirement of written form for the arbitration agreement contained in article 7, paragraph (2), of the UNCITRAL Model Law on International Commercial Arbitration ("the Arbitration Model Law").[1] The Working Group considered the possible preparation of a harmonized text on the writing requirement at its thirty-second (Vienna, 20-31 March 2000),[2] thirty-third (Vienna, 20 November-1 December 2000),[3] thirty-fourth (New York, 21 May-1 June 2001),[4] thirty-sixth (New York, 4-8 March 2002),[5] forty-third (Vienna, 3-7 October 2005),[6] and forty-fourth (New York, 23-27 January 2006)[7] sessions.

2. When the Working Group considered the issue of the requirement of written form for the arbitration agreement at its thirty-second session, it was generally observed that there was a need for provisions which conformed to current practice in international trade. It was also noted that national courts increasingly adopted a liberal interpretation of those provisions in accordance with international practice and the expectations of parties in international trade.[8]

3. It is recalled as well that the Working Group's intention in revising article 7 of the Arbitration Model Law has been to update domestic laws on the question of the writing requirement for the arbitration agreement, while preserving enforceability of such agreements as foreseen in the New York Convention. To achieve that purpose, two options had been presented, the first gave a detailed description of how the writing requirement could be satisfied (the revised draft article 7) and the other deleted the writing requirement altogether (the alternative proposal). Views were expressed that both the alternative proposal and the revised draft article 7 provided useful options to address concerns relating to the writing requirement.[9] A suggestion was made and adopted by the Working Group at its forty-fourth session that both the revised draft article 7, as amended by the Working Group, and the alternative proposal would be offered to States as alternative texts.[10]

## I. Draft legislative provisions on the form of arbitration agreement

4. The texts of the revised draft article 7 and the alternative proposal, as adopted by the Working Group at its forty-fourth session, read as follows.[11]

### 1. Revised draft article 7 of the Arbitration Model Law

**Article 7. Definition and form of arbitration agreement**

(1) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing.

(3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

(4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; "electronic communication" means any communication that the parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

(5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

(6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.

**2. Alternative proposal**

**Article 7. Definition of arbitration agreement**

"Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

## II. Notes on the draft legislative provisions on the form of arbitration agreement

### 1. Notes on the revised draft article 7 of the Arbitration Model Law

*Paragraph (1)*

5. Paragraph (1) reproduces article 7, paragraph (1), of the Arbitration Model Law.[12]

*Paragraph (2)*

6. Paragraph (2) reproduces the first sentence of article 7, paragraph (2), of the Arbitration Model Law, and is consistent with the language of article II, paragraph (2), of the New York Convention.[13]

*Paragraph (3)*

7. Paragraph (3) defines the writing requirement.[14]

**General remarks**

8. Paragraph (3) of the revised draft article 7 sought by way of a definition to clarify how the writing requirement could be fulfilled. At its forty-fourth session (New York, 23-27 January 2006), the Working Group discussed whether the purpose

of the writing requirement was to provide a record as to the consent of the parties to arbitrate or as to the content of the arbitration agreement.[15] After discussion, the Working Group was generally of the view that what was to be recorded was the content of the arbitration agreement as opposed to the meeting of the minds of the parties or any other information regarding the formation of the agreement, and therefore, reference to the content of the arbitration agreement would be appropriate in the text of paragraph (3).[16] In that context, it was pointed out that paragraph (3) dealt with the definition of the form of the arbitration agreement and the question whether the parties actually reached an agreement to arbitrate was a substantive issue to be left to national legislation.

9. It might be recalled that the intention of the Working Group was to ensure that the revised provision on the definition of the form of the arbitration agreement would encompass a variety of situations, including the case where a maritime salvage contract was concluded orally through radio with a reference to a pre-existing standard contract form containing an arbitration clause, such as the Lloyd's Open Form; contracts concluded by performance or by conduct (for example, a sale of goods under article 18 of the United Nations Convention on Contracts for the International Sale of Goods), with reference to a standard form containing an arbitration clause, such as documents established by the Grain and Food Trade Association (GAFTA); and contracts concluded orally but subsequently confirmed in writing. A mere reference in an oral contract to a set of arbitration rules or to a law governing the arbitral procedure to the extent the parties did not agree on any procedural rules are cases which are not intended to be addressed by that paragraph.

10. The Working Group agreed that further clarification in any explanatory material accompanying that provision, such as a guide to enactment and use, might be needed as to the factual situations that were intended to be covered by paragraph (3).[17] The Commission might wish to discuss the revised draft article 7 in the light of the factual situations listed below with a view to determining whether the draft adequately covers them, to the extent the Commission intends them to be covered.

**Factual situations**

11. At its thirty-second session[18] (Vienna, 20-31 March 2000), the Working Group considered several typical examples of situations where the parties agreed on the content of a contract containing an arbitration agreement and where there was written evidence of the contract, but where, nevertheless, current law, if interpreted narrowly, might be construed as invalidating or calling into question the validity of the arbitration agreement.[19]

12. The situations in (a) to (h) below are those where the parties have entered into a contract containing an arbitration clause but the form of that clause might be considered as not meeting the statutory requirement:

(a) A contract containing an arbitration clause is formed by one party sending written terms to another party, and that latter party fulfils its obligations under the contract without returning or making any other "exchange" in writing in relation to the terms of the contract;

(b) A contract containing an arbitration clause is formed on the basis of a text proposed by one party, which is not explicitly accepted in writing by the other party, but that latter party refers in writing to a contract in subsequent correspondence, invoice or letter of credit by mentioning, for example, its date or contract number;

(c) A contract is concluded through a broker who issues the text evidencing what the parties have agreed upon, including the arbitration clause, without there being any direct written communications between the parties;

(d) A reference is made in an oral agreement to a written set of terms, which may be in standard form, that contain an arbitration agreement;

(e) Bills of lading incorporate the terms of the underlying charter party by reference;

(f) A series of contracts are concluded between the same parties in a course of dealing, where previous contracts have included arbitration agreements but the contract in question has not been evidenced by a signed writing or there has been no exchange of writings for the contract;

(g) The original contract contains an arbitration clause, but there is no arbitration clause in an addendum to the contract, an extension of the contract, a contract novation or a settlement agreement relating to the contract (such a "further" contract may have been concluded orally or in writing);

(h) A bill of lading contains an arbitration clause that is not signed by the shipper or the subsequent holder.

13. The situations in (a) to (d) below refer to cases where it may be assumed that the arbitration agreement has been validly entered into by one set of parties and the question relates to the substantive issue of whether that arbitration agreement has become binding on a third party who later becomes party to the contract or assumes certain rights and obligations arising out of the contract:

(a) Third party rights and obligations under arbitration agreements contained in contracts which bestow benefits on third party beneficiaries or stipulation in favour of a third party (*stipulation pour autrui*);

(b) Third party rights and obligations under arbitration agreements following the assignment or novation of the underlying contract to the third party;

(c) Third party rights and obligations contained in arbitration agreements where the third party exercises subrogated rights;

(d) Rights and obligations contained in arbitration agreements where interests in contracts are asserted by successors to parties, following the merger or demerger of companies, so that the corporate entity is no longer the same.

14. It might be noted that the Working Group considered that the fact that the oral conclusion of certain types of contracts may be a customary practice in certain fields of trade or that arbitration agreements in certain types of contracts may be customary had more to do with substantive conditions for finding that an agreement to arbitrate had been reached than with its form. Since it was desirable that the model provision limits itself to issues of form and not deal with substantive conditions for the validity of arbitration agreements, the question of what was

customary and how agreement between the parties was reached was considered as falling outside the model provision.[20]

*Paragraph (4)*

15. The language used in paragraph (4) was consistent with that used in paragraph (2) of article 9 of the United Nations Convention on the Use of Electronic Communications in International Contracts ("the Convention on Electronic Contracts") and the definitions of "electronic communication" and "data message" reproduced the definitions contained under subparagraphs (b) and (c) of article 4 of the Convention on Electronic Contracts.[21]

*Paragraph (5)*

16. The provisions of paragraph (5) were included under article 7, paragraph (2), of the Arbitration Model Law, and the Working Group agreed to retain that paragraph.[22]

*Paragraph (6)*

17. The Working Group recalled that a principal purpose of paragraph (6) was to confirm the formal validity of arbitration agreements incorporated by reference. For example, parties might conclude by performance a contract whose terms were established in a standard form but that form might, in turn, not contain within it an arbitration clause but might, instead, incorporate an arbitration clause by reference to another document that contained its terms.[23] The Working Group agreed that, as a matter of general policy, the reference or other link to a written contractual document containing an arbitration clause should be sufficient to establish the formal validity of the arbitration agreement, and that domestic or other applicable law should determine whether the reference was such as to make that clause part of the contract or the separate arbitration agreement, notwithstanding that the contract or the separate arbitration agreement had been concluded orally, by conduct or by other means not in writing.[24]

### 2. Notes on the alternative proposal

18. The alternative proposal omitted entirely the writing requirement. Under that provision, oral arbitration agreements would be recognised as valid. In support of the alternative proposal, it was said that many national laws contained requirements as to form for arbitration agreements that could be regarded as outdated. It was noted that, in several jurisdictions that had removed the written form requirement for arbitration agreements, oral arbitration agreements were rarely used and had not given rise to significant disputes as to their validity.[25]

19. That alternative proposal was seen as establishing a more favourable regime for recognition and enforcement of arbitral awards than was provided for under the New York Convention, and therefore, by virtue of the "more favourable law provision" contained in article VII, paragraph (1), of the New York Convention, the Arbitration Model Law would apply instead of article II, paragraph (2), of the New York Convention.

20. While the proposed new text was considered useful to highlight the problems raised by the written form requirements, it was said that removal of the form requirement and of every reference to "writing" could create uncertainty.[26]

21. The Commission might wish to consider whether the alternative proposal should be retained and, in the affirmative, the form in which the revised draft article 7 and the alternative proposal might be presented in the Arbitration Model Law.

## III. Amendment to article 35, paragraph (2), of the Arbitration Model Law

22. Article 35, paragraph (2), of the Arbitration Model Law, modelled on article IV of the New York Convention, provides that the party relying on an award or applying for its enforcement should supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement or a duly certified copy thereof. In considering the drafts regarding the writing requirement for an arbitration agreement, the Working Group considered it necessary to ensure that a modified understanding of the writing requirement (article 7, paragraph (2), of the Arbitration Model Law and article II, paragraph (2), of the New York Convention) be reflected in article 35, paragraph (2), of the Arbitration Model Law, by amending that article as follows:[27]

**Article 35, paragraph (2), of the Arbitration Model Law**

The party relying on an award or applying for its enforcement shall supply the original award or a certified copy thereof. If the award is not made in an official language of this State, the court may request the party to supply a certified translation thereof into such language.

## IV. Explanatory material

23. At its forty-fourth session (New York, 23-27 January 2006), the Working Group agreed that explanatory material in relation to the legislative provisions on the form of arbitration agreement could be drafted along the lines of the existing explanatory note to the Arbitration Model Law and that such text could replace the current paragraphs 18, 19 and other affected paragraphs of that explanatory note. In addition, the Secretariat was requested to provide more detailed information on the form of arbitration agreement to enacting States in a guide to enactment and use of the revised provisions.[28] The Commission might wish to provide further guidance on that matter.

24. When the Commission considered the possibility of preparing model legislation, it was suggested that any model legislation that might be prepared with respect to the form of arbitration agreement might include a provision along the lines of article 7 of the United Nations Convention on Contracts for the International Sale of Goods, which is designed to facilitate interpretation by reference to internationally accepted principles. Similar provisions were included in the UNCITRAL Model Law on Electronic Commerce[29] and the UNCITRAL Model

Law on Cross-Border Insolvency.[30] It was said that such a non-binding commentary formulated by the Commission along with the model legislative provision could speed up the process of harmonization of law and its interpretation. The Commission might wish to decide whether such provision needs to be included.[31]

*Notes*

[1] *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17* (A/54/17), paras. 344-350 and para. 380.

[2] A/CN.9/468, paras. 88-106.

[3] A/CN.9/485, paras. 21-59.

[4] A/CN.9/487, paras. 22-41.

[5] A/CN.9/508, paras. 18-39.

[6] A/CN.9/589, paras. 108-112.

[7] A/CN.9/592, paras. 46-81.

[8] A/CN.9/468, para. 88.

[9] A/CN.9/589, paras. 110-112.

[10] A/CN.9/592, para. 74.

[11] Ibid., paras. 46-75 and annex II.

[12] Ibid., para. 49.

[13] Ibid., paras. 50-59.

[14] Ibid., para. 59.

[15] Ibid., para. 57.

[16] Ibid., paras. 61 and 62.

[17] Ibid., para. 62.

[18] A/CN.9/468, para. 95; A/CN.9/WG.II/WP. 108/Add.1, para. 12 and A/CN.9/WG.II/WP.110, paras. 16-26.

[19] These fact situations were listed in para. 12 of document A/CN.9/WG.II/WP.108/Add.1 and paras. 16-26 of document A/CN.9/WG.II/WP.110. Among them was also the case where a claimant seeks to initiate an arbitration against an entity not originally party to the arbitration agreement, or where an entity not originally party to the arbitration agreement seeks to rely on it to initiate an arbitration, for example, by relying on the "group of companies" theory. However, the Working Group considered that that situation raised difficult issues and the idea of a harmonised rule did not gain wide acceptance. (A/CN.9/468, para. 95).

[20] A/CN.9/485, paras. 39-41 and A/CN.9/592, para. 72.

[21] A/CN.9/592, para. 64.

[22] Ibid., paras. 65-68.

[23] Ibid., para. 69.

[24] Ibid., and A/CN.9/508, paras. 27-31.

[25] A/CN.9/592, para. 47.

[26] A/CN.9/589, para. 110.

[27] A/CN.9/592, paras. 76-80 and annex II.

[28] Ibid., para. 81.

[29] Article 3:"(1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith. (2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based."

[30] Article 8: "In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith."

[31] *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17* (A/54/17), para. 348 and A/CN.9/WG.II/WP.108/Add.1, para. 23.

United Nations A/CN.9/607

General Assembly

Distr.: General
13 April 2006

Original: English

**United Nations Commission on International Trade Law**
Thirty-ninth session
New York, 19 June- 7 July 2006

# Settlement of commercial disputes

## Draft declaration regarding the interpretation of article II, paragraph (2), and article VII, paragraph (1), of the New York Convention

## Note by the Secretariat

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## Introduction

1. At its thirty-second session (Vienna, 17 May-4 June 1999), the Commission decided that one of the priority items for the Working Group should be the requirement of written form for the arbitration agreement contained in article 7, paragraph (2), of the UNCITRAL Model Law on International Commercial Arbitration ("the Arbitration Model Law") and article II, paragraph (2), of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention").[1] At its thirty-fourth session (Vienna, 25 June-13 July 2001), the Commission noted that, while the Working Group should not lose sight of the importance of providing certainty as to the intent of the parties to arbitrate, it was also important to work towards facilitating a more flexible interpretation of the strict form requirement contained in the New York Convention, so as not to frustrate the expectations of the parties when they agreed to arbitrate. In that respect, the Commission took note of the possibility that the Working Group examine further the meaning and effect of the more-favourable-law provision of article VII, paragraph (1), of the New York Convention.[2]

2. At its thirty-fifth session (New York, 17-28 June 2002), the Commission noted that the Working Group had discussed a draft interpretative instrument regarding article II, paragraph (2), of the New York Convention. The Commission noted that the Working Group could not, at that stage, reach a consensus on whether to prepare an amending protocol or an interpretative instrument to the New York Convention. The Commission was of the view that member and observer States participating in the Working Group's deliberations should have time to consult on those important issues, including the possibility of examining further the meaning and effect of the more-favourable-law provision of article VII, paragraph (1), of the New York Convention, as noted by the Commission at its thirty-fourth session.[3]

3. The Working Group considered the topic of the written form requirement contained in article II, paragraph (2), of the New York Convention and the preparation of an interpretative instrument at its thirty-second (Vienna, 20-31 March 2000),[4] thirty-third (Vienna, 20 November-1 December 2000),[5] thirty-fourth (New York, 21 May-1 June 2001),[6] thirty-sixth (New York, 4-8 March 2002),[7] and forty-fourth (New York, 23-27 January 2006)[8] sessions.

## I. Draft declaration regarding the interpretation of article II, paragraph (2), and article VII, paragraph (1), of the New York Convention

4. The text of the draft declaration regarding the interpretation of article II, paragraph (2), and article VII, paragraph (1), of the New York Convention, as agreed by the Working Group at its forty-fourth session,[9] reads as follows:

> "*Declaration regarding interpretation of article II, paragraph (2), and article VII, paragraph (1), of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958*
>
> "*The United Nations Commission on International Trade Law,*

"[1] *Recalling* resolution 2205 (XXI) of the General Assembly of 17 December 1966, which established the United Nations Commission on International Trade Law with the object of promoting the progressive harmonization and unification of the law of international trade,

"[2] *Conscious* of the fact that the different legal, social and economic systems of the world, together with different levels of development are represented in the Commission,

"[3] *Recalling* successive resolutions of the General Assembly reaffirming the mandate of the Commission as the core legal body within the United Nations system in the field of international trade law to coordinate legal activities in this field,

"[4] *Conscious* of its mandate to further the progressive harmonization and unification of the law of international trade by, inter alia, promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade,

"[5] *Convinced* that the wide adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards has been a significant achievement in the promotion of the rule of law, particularly in the field of international trade,

"[6] *Recalling* that the Conference of Plenipotentiaries which prepared and opened the Convention for signature adopted a resolution, which states, inter alia, that the Conference 'considers that greater uniformity of national laws on arbitration would further the effectiveness of arbitration in the settlement of private law disputes',

"[7] *Bearing in mind* differing interpretations of the form requirements under the Convention that result in part from differences of expression as between the five equally authentic texts of the Convention,

"[8] *Taking into account* article VII, paragraph (1), of the Convention, a purpose of which is to enable the enforcement of foreign arbitral awards to the greatest extent, in particular by recognizing the right of any interested party to avail itself of law or treaties of the country where the award is sought to be relied upon, including where such law or treaties offer a regime more favourable than the Convention,

"[9] *Considering* the wide use of electronic commerce,

"[10] *Taking into account* international legal instruments, such as the 1985 UNCITRAL Model Law on International Commercial Arbitration, as subsequently revised, particularly with respect to article 7, the UNCITRAL Model Law on Electronic Commerce, the UNCITRAL Model Law on Electronic Signatures and the United Nations Convention on the Use of Electronic Communications in International Contracts,

"[11] *Also taking into account* enactments of domestic legislation, including case law, more favourable than the Convention in respect of form requirement governing arbitration agreements, arbitration proceedings and the enforcement of arbitral awards,

"[12] *Considering* that, in interpreting the Convention, regard is to be had to the need to promote recognition and enforcement of arbitral awards,

"[13] *Recommends* that article II, paragraph (2), of the Convention be applied recognizing that the circumstances described therein are not exhaustive,

"[14] *Recommends* that article VII, paragraph (1), of the Convention should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement."

## II. Notes on the draft declaration regarding the interpretation of article II, paragraph (2), and article VII, paragraph (1), of the New York Convention

5. The discussions in the Working Group initially focussed on article II, paragraph (2), of the New York Convention and on the various options available to deal with difficulties that had arisen in its interpretation. The Working Group was generally of the view that there was a need for provisions which conformed to current practice in international trade with regard to requirements for written form, and that the practice in some respects was no longer reflected by the position set forth in article II, paragraph (2) (and other international legislative texts modelled on that article), if interpreted narrowly.[10] The Working Group discussed possible alternative ways of achieving a broader interpretation of article II, paragraph (2).[11] These included a protocol amending the terms of article II, paragraph (2); adoption of a declaration, resolution or statement addressing the interpretation of the New York Convention and providing that, for the avoidance of doubt, article II, paragraph (2) was intended to cover certain situations or to have a certain effect; encouraging a liberal interpretation of the New York Convention by following the approach of some courts of interpreting article II, paragraph (2) in the light of the Arbitration Model Law;[12] and preparing practice guidelines or notes proposing that article 7 of the Arbitration Model Law could be used as an interpretation tool to clarify the application of article II, paragraph (2).[13]

6. The prevailing view was that, since formally amending or creating a protocol to the New York Convention was likely to exacerbate the existing lack of harmony in interpretation and that adoption of such a protocol or amendment by a number of States would take a significant number of years and, in the interim, create more uncertainty, that approach was essentially impractical. Taking the view that guidance on interpretation of article II, paragraph (2) would be useful in achieving the objective of ensuring uniform interpretation that responded to the needs of international trade, the Working Group decided that a declaration, resolution or statement addressing the interpretation of the New York Convention that would reflect a broad understanding of the form requirement could be further studied to determine the optimal approach.[14]

7. At its thirty-sixth session (New York, 4-8 March 2002), the Working Group discussed a draft interpretative instrument regarding article II, paragraph (2), of the New York Convention, in order to offer guidance on the interpretation and

application of the writing requirement contained in that article and to achieve a higher degree of uniformity. Article II, paragraph (2) has been the subject of different interpretations in State courts. In particular, what is meant by the term "signature", whether the signature requirement applies to both the arbitration clause in a contract as well as the arbitration agreement and what is required by an "exchange of letters or telegrams" are all matters on which there have been different and sometimes conflicting interpretations.[15] A/CN.9/WG.II/WP.139. The differing interpretations in State courts originated as well from the differences of expression between the five equally authentic texts of the New York Convention. Such differences were partly due to the fact that, for example, in the English version, the definition of "agreement in writing" (by using the word "includes") appeared to provide a non-exhaustive list of examples whereas some of the other equally authentic language versions appeared to provide an exhaustive list of elements of the definition.[16]

8. The draft declaration considered by the Working Group at its thirty-sixth session (New York, 4-8 March 2002) contained the recommendation or declaration that the definition of 'agreement in writing' in article II, paragraph (2), of the New York Convention should be interpreted to include [wording inspired from the revised text of article 7 of the UNCITRAL Model Law on International Commercial Arbitration]".[17] Views were expressed in the Working Group that the draft legislative provisions revising article 7 of the Arbitration Model Law being considered by the Working Group differed significantly from article II, paragraph (2), of the New York Convention in that, for example, under the draft legislative provision, an oral agreement that referred to written arbitration terms and conditions would be regarded as valid, whereas under article II, paragraph (2), of the New York Convention, as interpreted in many legal systems, it would not be so regarded.[18] Views were therefore expressed that it might not be appropriate to use an interpretative instrument to declare that article II, paragraph (2), of the New York Convention should be interpreted as having the meaning of the revised draft article 7 of the Arbitration Model Law. In considering the possibility of amending the Arbitration Model Law as a tool for interpreting article II, paragraph (2), of the New York Convention (without amending the New York Convention), the Working Group noted as well that national legislation might operate in the context of the more-favourable-law provision of article VII, paragraph (1), of the New York Convention.

9. At its forty-fourth session (New York, 23-27 January 2006), the Working Group proceeded to consider the text of a draft interpretative declaration on the interpretation of article VII, paragraph (1), of the New York Convention. That approach was considered as encouraging the development of rules favouring the validity of arbitration agreements in a wider variety of situations and encouraging States to adopt the revised version of article 7 of the Arbitration Model Law and pro-enforcement laws.[19] At that session, the Working Group agreed to include in the draft declaration provisions clarifying the meaning of article II, paragraph (2), of the New York Convention.[20]

10. It should be noted that the acceptability of allowing less restrictive form requirements to operate through article VII, paragraph (1), of the New York Convention would depend on whether article II, paragraph (2), of the New York Convention was regarded as establishing a requirement of form from which States

may depart when their national law on the form requirement is more favourable (thus leaving States free to adopt less stringent requirements) or whether the New York Convention was interpreted as providing a unified form requirement which arbitration agreements must comply with under the New York Convention. Courts, in many States, have established a clear position as to the circumstances in which article VII, paragraph (1) might be applied to uphold arbitration agreements where the form requirement set out in article II, paragraph (2) would otherwise not be met. The advantage of applying article VII, paragraph (1) would be to avoid the application of article II, paragraph (2) and, as States would enact more favourable provisions on the form requirement for arbitration agreements, would allow the development of rules favouring the validity of arbitration agreements in a wider variety of situations. Encouraging the wide adoption by States of article 7, paragraph (2), of the Arbitration Model Law, as proposed to be revised, could provide a useful means of achieving greater uniformity as to the form requirement. A declaration encouraging the application of more favourable legislation would have the added advantage of overcoming the requirement in article IV of the New York Convention regarding the presentation of an original of the arbitration agreement or a certified true copy. The Working Group had already proposed the deletion of that requirement from article 35, paragraph (2), of the Arbitration Model Law.[21]

11. The Commission might also wish to discuss the extent to which these considerations relating to article VII, paragraph (1), of the New York Convention might have an impact on future work regarding the Arbitration Model Law. Certain provisions of the Arbitration Model Law, which mirror the text of the New York Convention, such as for example, articles 7 and 35, paragraph (2), are proposed to be amended, so as to create more liberal rules, consistent with modern practice. The Commission might wish to discuss the extent to which the Arbitration Model Law might become the instrument through which the enforcement regime would be modernised. An alternative would be to further the modernization efforts by preparing an international binding instrument on international commercial arbitration, which would consist in developing the principles of the Arbitration Model Law into a convention, still allowing the existing instruments to operate in harmony.

12. When the Commission considered the possibility of preparing model legislation with a view to superseding article II, paragraph (2), of the New York Convention by relying on article VII, paragraph (1), of the New York Convention, it was suggested to establish (in addition to model legislation) guidelines or other non-binding material to be used by courts as guidance from the international community in the application of the New York Convention. It was said that such a non-binding commentary formulated by the Commission could speed up the process of harmonization of law and its interpretation.[22] The Commission might wish to provide further guidance on that matter.

*Notes*

[1] *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17* (A/54/17), paras. 344-350 and para. 380.

[2] Ibid., *Fifty-sixth Session, Supplement No. 17* (A/56/17), para. 313.

[3] Ibid., *Fifty-seventh Session, Supplement No. 17* (A/57/17), para. 183.

[4] A/CN.9/468, paras. 88-106.

[5] A/CN.9/485, paras. 60-77.

[6] A/CN.9/487, paras. 42-63.

[7] A/CN.9/508, paras. 40-50.

[8] A/CN.9/592, paras. 82-88.

[9] Ibid., and annex III to A/CN.9/592.

[10] A/CN.9/468, para. 88.

[11] A/CN.9/468, paras. 88-99.

[12] A/CN.9/WG.II/WP.108/Add.1, para. 36 and footnote 9.

[13] A/CN.9/WG.II/WP.108/Add.1, paras. 33 and 34.

[14] A/CN.9/468, paras. 88-99.

[15] A/CN.9/WG.II/WP.139.

[16] A/CN./9/592, para. 87.

[17] A/CN.9/508, paras. 40-50.

[18] A/CN.9/508, para. 45.

[19] A/CN.9/592, paras. 85-86.

[20] Ibid., para. 88.

[21] A/CN.9/592, paras. 76-80.

[22] *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17* (A/54/17), para. 348, and A/CN.9/WG.II/WP.108/Add.1, para. 34.